LIBRARY
SUPREME COURT, U. S.

Supreme Court, U.S.
FILED
SEP 21 1970
E. ROBERT SEAVER, CLERK

IN THE

Supreme Court of the United States

October Term, 1970

No. 492

NORMAN C. GALLAGHER and RUTH I. GALLAGHER, husband and wife,
Petitioners,

v.

CHARLES S. WILBOUR and HARRIET G. WILBOUR, his wife; and CHESTER L. GREEN and RUBY GREEN, his wife; on behalf of themselves and all other residents and property owners of the Town of Chelan, State of Washington, and all other members of the general public similarly situated,
Respondents.

BRIEF IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF WASHINGTON

CHARLES W. CONE
Counsel for Respondents

Of Counsel:
CHARLES W. CONE
Post Office Box 1267
Wenatchee, Washington 98801

JON H. PHELPS
ENGST, PHELPS & YOUNG
Post Office Box 1607
Wenatchee, Washington 98801

CRAFTSMAN & MET PRESS — SEATTLE, WASHINGTON

INDEX

	Page
Opinion Below	1
Jurisdiction	1
Questions Presented	2
Statement of the Case	2
Argument	4
1. Basis of Decision	4
2. Public Right of Navigation — Public Use	5
3. Application of Decision to Tidelands	6
4. Petitioner's Claim of a Taking of Property Without Compensation	6
Conclusion	7

TABLES OF AUTHORITY

Table of Cases

Diana Shooting Club v. Hustings 156 Wisc. 261, 145 N.W. 816, 1915c Ann. Cas. 1148 (1914)	4
Doemel v. Jantz, 180 Wisc. 225, 193 N.W. 393, 31 A.L.R. 969 (1923)	4, 5
Kerley v. Wolfe, 349 Mich. 350, 84 N.W.2d 748 (1957)	5
Mendota Club v. Anderson, 101 Wisc. 479, 78 N.W. 185 (1899)	5
Nelson v. DeLong, 213 Minn. 425, 7 N.W.2d 342 (1942)	5
State v. Malmquist, 114 Vt. 96, 40 A.2d 534 (1944)	4
Village of Pewaukee v. Savoy, 103 Wisc. 271, 79 N.W. 436 (1899)	4

Constitutional Provisions

United States Constitution, Fourteenth Amendment	6

Textbooks

65 C.J.S., page 130, §20	5

IN THE

Supreme Court of the United States

October Term, 1970

No. 492

NORMAN C. GALLAGHER and RUTH I. GALLAGHER, husband and wife,
Petitioners,
v.
CHARLES S. WILBOUR and HARRIET G. WILBOUR, his wife; and CHESTER L. GREEN and RUBY GREEN, his wife; on behalf of themselves and all other residents and property owners of the Town of Chelan, State of Washington, and all other members of the general public similarly situated,
Respondents.

BRIEF IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF WASHINGTON

Respondents ask that the petition for writ of certiorari filed herein be denied.

OPINION BELOW

The Washington Supreme Court's opinion is reported at 77 W.D.2d 307, 462 P.2d 214 (1969) and set forth in Petitioner's Brief as Appendix A.

JURISDICTION

The judgment sought to be reviewed was entered by the Washington Supreme Court on December 4, 1969, and Petition for Rehearing was denied May 7, 1970.

QUESTION PRESENTED

1. Should the decision of the Washington Supreme Court which required Petitioner to abate a dirt fill constructed by Petitioners in navigable waters of Lake Chelan, be sustained. Lake Chelan is a natural navigable body of water which is raised 21 feet annually (May through September) during the recreational water use season.

2. Did a dirt fill in Lake Chelan, a navigable body of water in the State of Washington which is annually raised by a power dam 21 feet during the summer recreational water use period so interfere with and obstruct navigation as to require its removal.

STATEMENT OF THE CASE

The historic level of Lake Chelan in its natural condition was 1079 feet above sea level, and the lake is approximately 55 miles in length, from one to two miles in width, and conceded to be a navigable body of water.

On May 2, 1927, Chelan Electric Co. was licensed by the Federal Power Commission to erect a dam for hydro power purposes and to impound the waters of Lake Chelan to an elevation of 1100 feet above sea level.

Chelan Electric Co. had previously secured the right to flood all lands on Lake Chelan to the 1100 foot level by the erection of a dam. The Town of Lakeside then vacated those parts of streets and alleys which were to be covered by the water of Lake Chelan but reserved in perpetuity the right of access for itself and the public over the vacated streets and alleys to Lake Chelan at all stages of water.

Chelan Electric Co. was first succeeded in interest by Washington Water Power and presently by the Chelan

County Public Utility District, all hydro-power utilities.

Since the dam was erected in 1928, the respective power companies have raised the waters of Lake Chelan between the minimum of 1079 feet and maximum of 1100 feet, between May and September each year. The Federal Power Commission license requires a minimum lake level of 1095 feet be met by June 15th of each year.

Each summer since 1928, the reservoir has been filled and the waters used for various water related activities by members of the public and respondents herein, for boating, swimming, fishing, water skiing, skin diving, etc.

In like manner, both prior to 1928, and subsequently, there has been regular commercial navigational activities on Lake Chelan throughout the year by regular daily trips by the Lake Chelan Boat Co. hauling passengers and freight; and for many years Howe Sound Mining Co. hauled ore on barges from their uplake dock to the foot of Lake Chelan.

In 1964, Petitioners herein filled Block 3, Lake Park Addition to the Town of Chelan, with dirt to a level of approximately 1115 feet above sea level. This dirt fill covers the entire Block 3 as well as the alley therein and portion of an adjacent vacated street. This property is subject to the flood rights acquired by Chelan Electric Co. and had been covered with waters of Lake Chelan from May through September each year from 1928 to 1964.

Petitioners dirt fill interfered with respondents' water access to their property, resulted in an accumulation of stagnant water and algae in water adjacent to respondents' property, and in like manner interfered with respondents' and the Public's continued use of the water of Lake Chelan

which had covered said Block 3 prior to the dirt fill of Petitioners.

The Washington Supreme Court held:

> ". . . we hold that when the level of Lake Chelan is raised to the 1100 foot mark (or such level as submerges the defendant's land), that land is subjected to the rights of navigation, together with its incidental rights of fishing, boating, swimming, water skiing, and other related recreational purposes generally regarded as corollary to the right of navigation and the use of public waters. *Nelson v. DeLong*, 213 Minn. 425, 7 NW2d 342 (1949)."
>
> "It follows that the defendant's fills, insofar as they obstruct the submergence of the land by navigable waters at or below the 1100 foot level, must be removed. The court cannot authorize or approve an obstruction to navigation."

ARGUMENT

1. Basis of Decision

The Washington Supreme Court sitting *en banc*, noted in its decision that this case was a matter of first impression. It rested its decision on the proposition that the dirt fills made by Petitioner in Lake Chelan constituted an obstruction to navigation in Lake Chelan while it existed in its natural state.

There is authority for the proposition that had the lake been raised to a constant level of 1100 feet, the public would have the right to use all of the water of the lake up to the 1100 foot level. *State v. Malmquist*, 114 Vt. 96, 40 A.2d 534 (1944); *Village of Pewaukee v. Savoy*, 103 Wisc. 271, 79 N.W. 436 (1899). This is true although the level of the navigable lake fluctuates due to natural causes. *Doemel v. Jantz*, 180 Wisc. 225, 193 N.W. 393; 31 A.L.R. 969 (1923); *Diana Shooting Club v. Hustings*, 156 Wisc. 261, 145 N.W. 816; 1915c Ann. Cas. 1148 (1914).

The logical extension of this proposition is that where a navigable body of water is periodically raised and lowered by artificial means, protection of the public interest similarly requires the public have the right to go where the navigable waters go, even though the navigable waters be over privately owned lands. *Doemel v. Jantz, supra.* To protect this right of the public any obstruction to navigation must be removed, and in the instant case the Washington Supreme Court ordered the dirt fill abated as an obstruction to navigation.

2. Public Right of Navigation — Public Use

> "The common right of the public to use navigable waters for navigation is superior to other rights in the water, and is not confined to the main channel, but extends over the entire surface of the water, from shore to shore, subject only to natural obstructions and lawful artificial obstructions." 65 C.J.S. p. 130, §20.
>
> "The right of navigation extends over the entire surface of the water, notwithstanding its extent has been increased through the raising of its level by artificial means." *Mendota Club v. Anderson,* 101 Wisc. 479; 78 N.W. 185.
>
> "Navigability and non-navigability mark the distinction between public and private waters. The state, in its sovereign capacity, as trustee for the people, holds all navigable waters and the lands under them for public use. Public use comprehends not only navigation by watercraft for commercial purposes, but the use also for the ordinary purposes of life, such as boating, fowling, skating, bathing, taking water for domestic or agricultural purposes and cutting ice." *Nelson v. DeLong,* 213 Minn. 425, 7 N.W.2d (p. 346) (1942).

An owner's title to subaqueous land is impressed with a public trust in the navigable waters overflowing such land. *Kerley v. Wolfe,* 84 N.W.2d 748 (1957).

3. Application of Decision to Tidelands

Petitioners seek review of this decision, which dealt strictly with an inland navigable lake whose natural water level has been artifically raised periodically each year by a dam, and which is located 150 miles from any coastline, on the basis that it may hereafter be applied to tidelands.

The questions concerning tidelands were never raised during the trial of this action nor does the decision of the Washington Supreme Court mention tidelands in any manner. These questions must await presentation for consideration in another and later case.

4. Petitioner's Claim of a Taking Property Without Compensation

Petitioners claim that this alleged taking of their property rights without compensation is in violation of the Fourteenth Amendment to the Constitution of the United States.

Thus it is Petitioners position that this decision either prevents Petitioner from making any reasonable use of their property or it operates to defeat the constitutional prohibition against taking property without due process of law.

Petitioner overlooks the basic fact that at the time of his acquiring title to Block 3, the Chelan Electric Company, pursuant to a permit issued by the Federal Power Commission, was required to raise the level of Lake Chelan to the 1100 foot level by June 15th of each year, thus causing Block 3 to be submerged for a portion of each year to a depth of three to fifteen feet. As a consequence of such annual submergence of Block 3, the rights of public usage were created and were evident for over 30 years prior to Petitioner's acquisition. Notice of this fact was

carried in title reports to such land, and the restrictions caused the land to have minimal assessed value for real estate tax purposes and a minimum value for sale purposes.

Petitioner did not lose any of the rights he had purchased. His initial acquisition of title to Block 3 found him with a title which limited its use, therefore he cannot now complain of his bargain.

CONCLUSION

This case was one of first impression of the Supreme Court of Washington. Eastern State and Federal jurisdictions had long ago faced like situations of challenges to public use. The Washington Court logically extended the law relating to naturally fluctuating waters to this instance of artificial, federally mandated, fluctuating levels of water, and recognized the public right to go where the navigable waters go and the Washington Court could not authorize or approve an obstruction to navigation.

Respondents respectfully submit that the decision of the Supreme Court of Washington is based on substantial authority, both state and federal, and that this petition for a writ of certiorari should be denied.

Respectfully submitted,

CHARLES W. CONE
Counsel for Respondents

Of Counsel:
CHARLES W. CONE
Post Office Box 1267
Wenatchee, Washington 98801

JON H. PHELPS
ENGST, PHELPS & YOUNG
Post Office Box 1607
Wenatchee, Washington 98801

LIBRARY
SUPREME COURT, U. S.

Supreme Court, U.S.
FILED
SEP 21 1970
E. ROBERT SEAVER, CLERK

IN THE

SUPREME COURT

OF THE

UNITED STATES

October Term, 1970

No. 492

NORMAN C. GALLAGHER and
RUTH I. GALLAGHER,
husband and wife,
Petitioners,

v.

CHARLES S. WILBOUR and
HARRIET G. WILBOUR, his wife;
and CHESTER L. GREEN and
RUBY GREEN, his wife;
on behalf of themselves and all other residents
and property owners of the Town of Chelan,
State of Washington, and all other members of
the general public similarly situated,
Respondents.

BRIEF AMICUS CURIAE OF THE STATE OF WASHINGTON IN OPPOSITION TO THE PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF WASHINGTON

SLADE GORTON,
Attorney General of the State of Washington
CHARLES B. ROE, JR.
CHARLES W. LEAN
MALACHY R. MURPHY,
Assistant Attorneys General
CHARLES E. CORKER,
Special Assistant Attorney General
State of Washington
Temple of Justice, Olympia, Washington 98501

STATE PRINTING PLANT OLYMPIA, WASH., 1970

IN THE

SUPREME COURT

OF THE

UNITED STATES

October Term, 1970.

No. 492

NORMAN C. GALLAGHER and
RUTH I. GALLAGHER,
husband and wife,
Petitioners,

v.

CHARLES S. WILBOUR and
HARRIET G. WILBOUR, his wife;
and CHESTER L. GREEN and
RUBY GREEN, his wife;
on behalf of themselves and all other residents and property owners of the Town of Chelan, State of Washington, and all other members of the general public similarly situated,
Respondents.

BRIEF AMICUS CURIAE OF THE STATE OF WASHINGTON IN OPPOSITION TO THE PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF WASHINGTON

SLADE GORTON,
Attorney General of the State of Washington

CHARLES B. ROE, JR.
CHARLES W. LEAN
MALACHY R. MURPHY,
Assistant Attorneys General

CHARLES E. CORKER,
Special Assistant Attorney General
State of Washington